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IN THE

SUPREME COURT

OF THE

UNITED STATES

IN EQUITY

October Term, 1935

No. [redacted]5 Original

THE STATE OF NEBRASKA,

Complainant.

VS.

THE STATE OF WYOMING,

Defendant.

OBJECTIONS OF COMPLAINANT TO DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER; AND ARGUMENT IN SUPPORT OF OBJECTIONS

WM. H. WRIGHT,
Attorney General of the State of Nebraska,
PAUL F. GOOD,
Solicitors for Complainant.

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To the Honorable The Chief Justice, and The Associate Justices of the Supreme Court of the United States:

Comes now the Complainant, the State of Nebraska, and respectfully objects to the allowance to Defendant of leave to file its proposed Amended and Supplemental Answer, unless there be first stricken from the same the Twentieth Article thereof, appearing on pages 26 and 27, and likewise the first ten lines of the Prayer of said proposed Amended and Supplemental Answer. The grounds and reasons for these objections are as follows:

1. That this Court has already determined in its order and opinion in this cause, delivered and entered on April 1, 1935, that the State of Colorado is not a proper party herein for the reason that Nebraska asserts no wrongful act of Colorado, and prays for no relief against her. The allegations and prayer to which objection is here made constitutes an attempt to evade the order and ruling of this Court, and to bring into the issues herein a party already held by this Court to be not a proper party in this cause.

2. That the allegations of said Twentieth Article of said proposed Amended and Supplemental Answer do not assert any wrongful act on the part of the State of Colorado which is material or germane to any of the issues raised by the Bill of Complaint or which bear any relationship to the wrongful acts of the Defendant of which complaint is made in said bill. Said allegations seek to import into this controversy an issue which is extraneous thereto, and foreign to any issue between the State of Nebraska and the State of Wyoming; and would merely create confusion and tend to prevent a fair determination of the rights of the Complainant State of Nebraska against the Defendant State of Wyoming.

3. Said proposed Amended and Supplemental Answer, and the portion of the Prayer thereof, to which these objections are directed, does not ask for any equitable relief by way of injunction or otherwise; nor does it pray that this Court enter any order requiring the State of Colorado to take any action or restraining the State of Colorado from doing anything. It does not ask for any remedy, legal or equitable, against the State of Colorado, and therefore it does not invoke the jurisdiction of this Court against said State upon any known principles of law or equity.

4. Said proposed Amended and Supplemental Answer does not purport to be or to contain a Cross-Bill. The Motion for leave to file the same does not contain any notice that additional parties are sought, and the allowance of said motion would leave the record indefinite and uncertain as to whether or not this Court was granting permission to bring in an additional party, namely, the State of Colorado.

5. The attempt to make an additional party comes too late for it to be allowed. Defendant filed its Answer herein making no attempt to bring in any additional parties. Complainant joined issue with said Answer by filing its Replication. This Court, on October 14, 1935, sustained Complainant's motion for the appointment of a Special Master, and appointed Michael J. Doherty, Esq., of St. Paul, Minnesota, as such Special Master. By the same order, this Court referred this cause to said Special Master, with specific orders and directions as to further proceedings herein. Complainant has made preparations at great trouble and expense to take testimony in this cause, and tentative plans have been made for that purpose. It would be unjust and inequitable to permit defendant at this stage

of the proceedings, after issue has been joined, and a Special Master appointed, all without objection on its part, to inject another party and a new issue into this controversy.

6. It is not shown that any change has occurred in relation to the subject matter of this controversy, since the defendant filed its original Answer herein.

7. The Bill of Complaint herein alleges grave wrongs being done to Complainant and its citizens by the illegal diversions of waters of the North Platte River by the defendant and its appropriators, which it is alleged are now causing great and irreparable damage to complainant and its citizens. Complainant is entitled to an early and speedy trial and determination of the issues, in order that these diversions, if they are wrongful as complainant contends, may be restrained, and complainant may not be further damaged. The addition of another party to this controversy will cause a delay in the proceedings herein necessitated by the framing and joining of issue between Wyoming and Colorado, during the course of which it will appear that Colorado is not a proper party to this proceeding. The delay will cause irreparable injury to the Complainant and its citizens, since, during such delay, the wrongful acts complained of in the Bill of Complaint, will be continuing.

8. That no application has been made to recall the reference of this cause to the Hon. Michael J. Doherty as Special Master, or to enlarge the scope of said reference so as to permit him to pass upon questions of pleadings, motions or demurrers which might be filed by the State of Colorado if made a party hereto. If the portions of the proposed Amended and Supplemental Answer, to which objection is

made, are permitted to stand, the procedure before said Special Master will be confusing and uncertain, so that it will be impossible for the parties to know what steps to take in relation to such issues as may be raised if and when process has been issued bringing the State of Colorado into the cause.

9. The State of Colorado is neither a necessary nor proper party in this action.

ARGUMENT

Complainant urges that defendant's motion for leave to file its proposed Amended and Supplemental Answer be denied, unless the Twentieth Article thereof (relating to some controversy between Wyoming and Colorado as to the North Platte waters), and also the first ten lines of the Prayer, first be stricken from said proposed Amended and Supplemental Answer. Complainant has no desire to deprive Defendant of any ground of defense which it may legitimately conceive to be within the issues. Accordingly, Complainant is making no objection to the filing of said proposed Amended and Supplemental Answer, provided the portions to which objection is herein made are first stricken. Of course, Complainant does not admit the truth of the matters alleged in the proposed Amended and Supplemental Answer, and reserves the right to traverse them by appropriate replication.

The indirect method by which defendant seeks to make Colorado a party is somewhat peculiar. No motion has been filed directly seeking that relief. The motion for leave to file the Amended and Supplemental Answer nowhere mentions the fact that defendant is now asking that Colorado be made a party. This Court is not at this time called

upon to take action permitting the issuance of process directed to the State of Colorado and requiring it to answer. A Special Master has already been appointed, and the order of reference, made October 14, 1935, gives him the following authority:

> "To summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree."

No application or motion has been made to this Court asking that the reference be recalled for further issues to be made up, or that the order of reference be enlarged so as to give the Special Master jurisdiction to order that Colorado be made a party; to order that process be issued for that purpose; to pass upon motions, demurrers, etc., which might be filed; or to pass upon issues in a three-cornered contest which might develop.

With the record in its present state, it seems clear that the designated portions of the proposed Amended and Supplemental Answer cannot be permitted to stand.

The Portions of the Amended Answer Herein Objected to Are An Evasion of the Previous Order of This Court

On April 1, 1935, after argument, this Court ruled upon Defendant's motion to dismiss the Bill of Complaint, which motion was made on the ground, among others, that Colorado was not made a party. With respect to that ground

of motion, Mr. Justice Roberts said the following in delivering the opinion of the Court:

> "1. Colorado is said to be an indispensable party, because the bill discloses that the North Platte rises in that state and drains a considerable area therein. The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and the rights of their citizens in the waters of the North Platte River."

The only additional or new allegation made in the Amended and Supplemental Answer with reference to Colorado is that said state is threatening the diversion and use of 250,000 acre-feet of water per annum from the North Platte River. No relief is asked against Colorado in the way of an attempt to restrain such diversion. No allegation is made as to whether such diversion is wrongful or not; nor as to what priority should or would be assigned to such a diversion; nor as to whether Colorado intends, in the operation of the project which contemplates such diversion, to follow the rule of priorities. It is not shown that such contemplated Colorado diversion if carried into completion, would or should in any manner affect the reciprocal or relative rights and duties of Nebraska and Wyoming which are the subject matter of this suit.

To paraphrase the above-quoted, previous opinion of this Court in this cause "upon the face of the bill and proposed Amended and Supplemental Answer she (Colorado) is not a necessary party to the dispute between Nebraska and

Wyoming. concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

Until some reason is shown as to why Colorado enters into the dispute as to the respective priorities of Nebraska and Wyoming citizens in the waters of the North Platte River, we submit that this Court's previous ruling should stand, and the present controversy should be kept free from the complications which would necessarily develop if extraneous issues were injected.

Defendant Has Delayed Too Long in Attempting to Bring In Colorado as a Party

The present proposed Amended and Supplemental Answer is lodged with the Clerk of this Court, and served upon Complainant more than six months after the original Answer was filed. In the meantime, Complainant filed its replication, and moved for the appointment of a Special Master. The motion was sustained, and nearly two months before Defendant applied for leave to file its Amended and Supplemental Answer this Court appointed the Special Master and ordered the cause referred to him. Defendant does not attempt to explain why the original answer did not seek to bring in Colorado as a party. The proposed diversion of waters by Colorado, which is asserted as the only new ground for the attempt to bring in Colorado is not alleged as a recent development. On the contrary, in the Twentieth Article of the proposed Amended and Supplemental Answer (p. 26), it is alleged:

> "That the State of Colorado and its citizens now contemplate *and for a long time have contemplated and threatened* and now threaten"

such diversion. It is not alleged that Defendant has only recently discovered this alleged plan of Colorado's and presumably it has been known to Defendant for a long time.

Complainant has made extensive plans for proceeding to an immediate hearing of this cause. It has gone to great trouble and expense in its preparations. The injustice of Defendant's present demand is obvious.

Defendant's Allegations With Reference to Colorado Are Too Indefinite and Speculative to Justify Bringing Her In as a Party

It is to be noted that the allegations which complainant here seeks to strike are entirely lacking in particularity. It is not shown that there is any definite project formed, or that there is any plan with reference to the proposed diversion which has progressed beyond the speculative stage. No allegations are made as to the means of diversion, the direction in which the water will be carried, the agency through which the proposed plan is to be carried to completion, or the description or the location of the lands on which the water is to be used, or in fact the nature of such use. It is not shown that any steps have been taken looking to the financing of what obviously would be an expensive project. If Complainant had sought to make Colorado a party defendant with such vague and indefinite allegations, clearly a motion on the part of Colorado to dismiss must have been sustained. The situation is analogous to that between Arizona and the other states on the Colorado River, in the case of *Arizona* v. *California*, 283 U. S. 423, 75 L. Ed. 1154. In that case, this Court dismissed the Bill of Complaint brought by Arizona, on the ground, among

other reasons, that the bill did not show with sufficient definiteness and certainty that there were any actual or threatened acts of the other States, or of the United States, which would damage Arizona.

We quote from the opinion (283 U. S. 462-464, 75 L. ed. 1170):

> "There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions above the dam or with the enjoyment of water so appropriated. Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion."

The following note in the margin is made to the first sentence of the foregoing quotation:

> "There is in the bill a further allegation that, under color of the act, Wilbur has seized and taken possession of all that part of the Colorado river which flows in Arizona and on the boundary thereof, and of the water now flowing therein, and of all the dam sites and reservoir sites suitable for irrigation of the Arizona land and for the Arizona land and for the generation of electric power 'and now has said river, said water and said sites in his possession; and has excluded and is now excluding the state of Arizona, its citizens, inhabitants and property owners from said river, said water and said sites, and from all access thereto; has prevented and is now preventing said state, its citizens, inhabitants and property owners from appropriating any of said 8,000,000 acre-feet of unappropriated water. * * *' But from other parts of the bill and from the argument, it is clear that there has been no physical taking of possession of anything,

and that Wilbur has not trespassed on lands belonging either to Arizona or any of its citizens. This allegation is thus merely a conclusion of law from the fact that Wilbur in conformity with the provisions of the act, has made plans for the construction of the dam and resorvoir, promulgated regulations concerning the use of the water to be stored, and executed contracts for the use of some of it."

In the instant case there is no allegation of any definite physical act by which Colorado is interfering or will interfere with any of the rights of either Complainant or Defendant, nor any reason given why Colorado should be compelled to come into this Court and justify any action or threatened action of hers.

It seems clear that the allegations made by defendant are insufficient to justify the joining of Colorado as a party.

Delay Is Unfair to Nebraska

Complainant respectfully urges that Defendant should not be permitted to delay the proceedings, in that the wrongs of which Nebraska complains in its Bill of Complaint are continuing, are causing irreparable damage to Nebraska's citizens, and in view of the fact that such damage is mounting up to very large proportions while the proceedings are pending.

It is obvious that the addition of a new party will cause very great delay. If Colorado is brought in, she must have time to answer; she may desire to file a motion, which would necessarily delay the formation of the issues. There is a possibility that the injection of the issues which are now sought to be brought in, would delay the determination of the cause for a matter of years.

If Complainant is right in its contentions, it should have a speedy hearing and determination of the issues. Crops

cannot wait for water; and each season which passes wherein an irrigator is deprived of water, depletes his resources the more. While haste is never wise or desirable, it should be noted that more than fourteen months have already passed since Complainant, with leave of this Court, filed its bill. One irrigation season has passed, and with the issues as they now stand, one and perhaps two more must pass before a final decision can be expected. With another complexity added; with Colorado in the case possibly asserting rights against both Wyoming and Nebraska, it is impossible to say how much longer the Nebraska appropriators must wait before their rights are determined.

Wyoming does not suffer from delay. The water of the North Platte flows first through her lands, and Wyoming is in a position physically to take the water at will. Nebraska must wait for relief from this Court in order to enjoy the waters to which she believes herself to be entitled.

CONCLUSION

For all the reasons hereinbefore stated, Complainant respectfully submits that this Court should not permit the proposed Amended and Supplemental Answer to be filed unless and until there is stricken from it the Twentieth Article, on pages 26 and 27, and the first ten lines of the Prayer thereof.

Respectfully submitted,

WM. H. WRIGHT,
Attorney General of the State of Nebraska,
PAUL F. GOOD,
Solicitors for Complainant.

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